

**SUPERIOR COURT  
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 N. KING STREET, SUITE 10400  
WILMINGTON, DELAWARE 19801  
(302) 255-0669

March 23, 2005

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Re: *McBride v. Shipley Manor Health Care, et al.*,  
*C.A. No. 04C-06-291-FSS - -*  
*Upon Defendant Shipley Manor's Motion to Dismiss*

Dear Counsel:

This formally and definitively decides Defendant, Shipley Manor's Motion to Dismiss, which was based on Plaintiffs' failure to submit an Affidavit of Merit. The question presented is whether the recently enacted Affidavit of Merit requirement<sup>1</sup> applies to lawsuits brought against skilled nursing home facilities, including Shipley Manor.

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<sup>1</sup> 18 *Del. C.* § 6853.

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As you will recall, the court addressed the issue preliminarily in its letter dated August 27, 2004. The court inquired as to whether Defendant is licensed under Title 24, excluding Chapter 11 to provide health care professional services. In response, by letter dated September 1, 2004, Defendant produced its "State of Delaware, Department of Health and Social Services License to operate an eighty-two bed Skilled Nursing Facility."

Under 18 *Del. C.* § 6853(a), no "health care negligence lawsuit" shall be filed in Delaware unless the complaint is accompanied by an Affidavit of Merit, signed by an expert witness. "Health care" means any act or treatment furnished by any health care provider on behalf of a patient during the patient's confinement. 18 *Del. C.* § 6801(4). Under 18 *Del. C.* § 6801(5), a "health care provider" is a corporation "licensed by this State pursuant to . . . Title 16 to provide health care or professional services." Moreover, under 18 *Del. C.* § 6801(7), "Medical Negligence" means any tort based on health care professional services rendered.

Taking the complaint's allegations, the undisputed fact that Defendant is a licensed skilled nursing home facility under Title 24, and Title 18 § 6801 into account, the court finds that this is a health care negligence lawsuit and Defendant is a health care provider. Accordingly, 18 *Del. C.* § 6853 applies and Plaintiffs cannot proceed unless they file the statutorily required Affidavit of Merit.

In reaching this conclusion, the court is relying on the undisputed facts and the statute's plain language. The court's conclusion, however, is supported by common sense. Basically, Plaintiffs allege negligent nursing care by Defendant. Eventually, Plaintiffs will have to present expert testimony on the standard of care. A jury cannot decide, on its own, the standard of care for a nursing home. Accordingly, Plaintiffs will have to produce an expert sooner or later. It is consistent with the General Assembly's intent when it enacted the Affidavit of Merit requirement to require Plaintiffs to produce an expert sooner, rather than later.

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Consistent with the penultimate paragraph of the court's August 27, 2004 letter, the court is allowing Plaintiffs to submit an Affidavit of Merit. And also consistent with the letter, the court is imposing a short deadline for Plaintiffs to comply with the Affidavit of Merit requirement. Plaintiffs have had since August 27, 2004, at the earliest, and September 1, 2004, at the latest, to line-up their expert.

For the foregoing reasons, the complaint shall be dismissed twenty-one (21) days from this order's date, unless before the twenty-first day, Plaintiffs submit an Affidavit of Merit. Plaintiffs are further cautioned that the court does not anticipate providing another grace period if Plaintiffs miss the deadline imposed here, or the Affidavit of Merit is unsatisfactory.<sup>2</sup> Finally, if Plaintiffs submit an Affidavit of Merit before the deadline, the court will review it *sua sponte*.

**IT IS SO ORDERED.**

Very truly yours,

/s/ Judge Fred S. Silverman

FSS/lah  
oc: Prothonotary (Civil Division)

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<sup>2</sup> See e.g. *Ellet v. Ramzy*, Del. Super., C.A. No. 04C-03-201, Silverman, J. (Sept. 29, 2004) (ORDER), see also *Bell v. Yalamanchilli*, Del. Super., C.A. No. 03C-11-046, Johnston, J. (Mar. 25, 2004) (ORDER).